

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
VAROJAN SAVADJIAN	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Year 1981.	:	

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Petitioner, Varojan Savadjian, 4 Davenport Court, Old Tappan, New Jersey 07675, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1981 (File No. 807280).

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 7, 1990 at 9:15 A.M., with all briefs due by April 30, 1990. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth Schultz, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claim for refund of personal income taxes for the tax year 1981.

FINDINGS OF FACT

Petitioner, Varojan Savadjian, resided in Manhasset, New York, and was a resident of New York State during the tax year 1981. He is presently a chartered life underwriter and chartered financial consultant for the Prudential Insurance Company. During the year in question, he was a field sales manager.

In 1981, petitioner prepared his Federal income tax return and New York State income

tax return showing refunds due of \$22,524.00 and \$7,776.00, respectively. The New York State refund resulted from New York State and New York City taxes withheld from wages paid to Mr. Savadjian during 1981. A copy of Form W-2, the Wage and Tax Statement, was attached to petitioner's return. Petitioner testified that his return was prepared during late March and early April 1982, and signed and mailed on or about April 10, 1982. The return was sent by regular U.S. Postal Service mail.

The Division of Taxation contends that it never received petitioner's 1981 New York State personal income tax return, and submitted a Certificate of Non-filing, indicating "that a search has been made of the Personal Income Tax files for the Personal Income Tax Return for the year 1981 of Varojan Savadjian, social security account number \_\_\_\_\_, and that no such Personal Income Tax return was located."

On August 5, 1987, the Central Income Tax Section of the Division of Taxation issued to petitioner, Varojan Savadjian, a Notice of Disallowance of petitioner's claim for refund for the tax year 1981 in the amount of \$7,776.00 with the following explanation in part:

"You have not established that your return was filed before the Statute of Limitations expired."

Petitioner testified that he received his Federal income tax refund for 1981 of \$22,524.00 during August 1982 and submitted a copy of the U.S. Treasury check made out to him indicating that it was the refund for that particular tax year. Petitioner indicated that he expected the New York State refund to follow, and when it did not come, he began calling the State Tax Department.

According to petitioner's notes and records, his first telephone call to the Division occurred on Wednesday, November 10, 1982 and was made to (518) 474-2121, at which time he gave the Division employee his social security number and he was informed that he would receive his refund in the near future.

The next call that petitioner has recorded in his notes was made on Friday, October 21, 1983, to the Division. Petitioner testified that he was again informed that he would have his refund for 1981 in a short period of time having expressed a great deal of anger and frustration

to the State employee.

In between these two telephone calls, petitioner was promoted by Prudential to full branch manager in a district office covering all of Bergen County, New Jersey. This position required working approximately 14 hours a day, 7 days a week for approximately the first 9 months of 1983, and as a result the claim for refund was not foremost in petitioner's mind.

Petitioner again called the Division of Taxation on Tuesday, April 10, 1984, having realized during the preparation of his 1983 tax returns, that he had still not received his 1981 refund. He indicated that the Division employee did not give him any answer with respect to his refund claim, but took his office telephone number in order to return his call. He received none.

From the beginning of 1984 until her death in November 1984, petitioner testified that he was preoccupied and overwhelmed with the sickness of his future mother-in-law.

While preparing his 1984 tax return on or about April 12, 1985, he again called the Division. Having obtained a telephone number for calls coming from outside New York State, he called (518) 438-6777 from his office in New Jersey which again was to no avail. In addition, petitioner indicated that at no time in all the telephone calls was he ever informed that he should have requested such information in writing. However, at the urging of his new wife (petitioner married in 1985) he wrote a letter on June 30, 1985. In that letter, petitioner enclosed copies of both his 1981 and 1982 New York State and New York City income tax returns. He indicated that he was waiting for refunds from New York State in the amounts of \$7,776.00 for 1981 and \$2,565.00 for 1982. On or about September 27, 1985, petitioner received his 1982 refund in the amount of \$3,289.00 which presumably was the refund for which he filed plus interest due and owing. In another letter to the Division dated November 19, 1985, petitioner indicated such receipt and further stated that he had not yet received his 1981 refund or any correspondence with regard to that tax year.

On February 25, 1986, the New York State Department of Taxation and Finance sent petitioner a very brief rejection of his refund claim indicating that it had received his claim for

the year 1981 on November 19, 1985, and since the deadline was April 15, 1985, the law did not permit the claim for refund.

By a letter dated March 19, 1986, Diana Sarkissian, an attorney representing petitioner (also petitioner's new spouse), set forth the documentation and the information with respect to the telephone calls regarding the 1981 and 1982 tax refunds. A year passed without any response from the Division, and by a letter dated March 5, 1987 Ms. Sarkissian made another inquiry with respect to the refund for 1981. When petitioner and his representative received no response by May 20, 1987, a letter was sent to Commissioner Roderick Chu, with a request to have his office review this matter. Petitioner received correspondence from John B. Langer, Deputy Commissioner for Operations, on or about August 7, 1987 indicating in part:

"[T]he law does not permit us to allow the 1981 refund you claimed. We have no record of receiving your 1981 return prior to the copy you sent with your letter of June 30, 1985. The last day to file this return was 4/15/85."

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner states that his return was timely filed before April 15, 1982. He believed he had no reason or cause to doubt that a return mailed in the preprinted envelope provided in the tax booklet, would not be received by the Division and processed appropriately. Petitioner believes that since he filed his return in a timely manner and made numerous attempts to contact the New York State Department of Taxation and Finance with respect to his refund, he should be granted his claim for refund.

The Division of Taxation argues that the mailing of petitioner's 1981 tax return by ordinary mail cannot establish that the return was received by the Department of Taxation and Finance. The Division also contends that petitioner's claim for refund was made pursuant to his correspondence with attached copy of his 1981 tax return on June 30, 1985 and that the statute of limitations had already expired. Thus petitioner is not entitled to any portion of the refund claimed.

#### CONCLUSIONS OF LAW

A. Tax Law § 691(a) provides, in pertinent part:

"If any...document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date...is, after such period or such date, delivered by United States mail..., the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.... If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed."

B. Without actual delivery of the refund claim, proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing (Matter of WSD United Transportation Inc., Tax Appeals Tribunal, July 27, 1989). Petitioner's testimony was insufficient to prove that the return was received by the Division of Taxation. The first time the records of the Division of Taxation reflect receipt of petitioner's return is June 30, 1985.

C. Pursuant to Tax Law § 687(i) and former section T46-187.0(i) of the New York City Administrative Code, the taxes withheld from petitioner's wages during 1981 were deemed to have been paid to the State of New York on April 15, 1982. Petitioner made a claim for refund of overwithheld taxes on his 1981 return and showed a refund due of \$7,776.00. With respect to the time allowed to make such claim for refund Tax Law § 687(a) and New York City Administrative Code former § T46-187.0(a) provide, in part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return...."

Since petitioner filed a return on June 30, 1985, and not before that date, his claim for credit or refund was three years from the filing of that return. In fact, June 30, 1985 is also considered the date of the claim. Since the Tax Law indicates that the amount of refund is limited to "the portion of the tax paid within the three years immediately preceding the filing of the claim, then petitioner is not entitled to any portion of the refund claim since the taxes withheld from petitioner's wages were deemed to have been paid on April 15, 1982, more than three years before the date of the refund claim on June 30, 1985.

D. During the hearing, a reference was made to the special refund authority pursuant to

Tax Law § 697(d). It states, in pertinent part:

"Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

Where a taxpayer attempts to recover under the special refund authority he must be able to show first that there are no unresolved questions of fact or law with respect to the refund claim. In this case there is at least an unresolved question of fact as to whether petitioner timely mailed the 1981 tax return on or about April 10, 1982.

It is also necessary as a second condition that the money which is the subject of the claim have been erroneously or illegally collected from the taxpayer under a mistake of fact. There is nothing in the record that supports the contention that a refund claim on the basis of overwithheld taxes was the result of a mistake of fact. Further, there is nothing in the record to support a conclusion that petitioner made a payment based on a mistake of fact (see, Matter of Martin M. and Mary Jo Filler, Tax Appeals Tribunal, August 24, 1989). In fact, in this case, petitioner testified that he had consistently received large refunds from many consecutive years as a result of having many business deductions against his significant income. No relief can be granted to petitioner under Tax Law § 697(d) since the statutory conditions have not been met.

It is unfortunate that petitioner was so overwhelmed by his professional and personal demands that he did not follow the letter of the law in order to obtain his significant New York State tax refund. Petitioner's presence and testimony indicated not only honesty and integrity, but his manner of presenting his case and the impeccable appearance of his records indicates that he considers tax filing a serious matter and exerts due diligence in this regard. It is certainly a shame that so many months passed before he realized his obligation to make a formal written claim.

E. The petition of Varojan Savadjian is in all respects denied.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE